Duquesne Law Review

Volume 37 | Number 1 Article 9

1998

Age Discrimination in Employment Act (ADEA) - Older Workers Benefit Protection Act (OWBPA) - Ratification - Tender Back

Maureen R. Jordan

AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)—OLDER WORKERS BENEFIT PROTECTION ACT (OWBPA)—RATIFICATION—TENDER BACK—The Supreme Court of the United States held that an employee's ADEA claim is not barred when a waiver thereof does not comply with the specific requirements of OWBPA, even if the employee does not return or offer to return the consideration received for releasing claims against an employer.

Oubre v. Entergy Operations, Inc., 118 S. Ct. 838 (1998).

In 1967, Congress enacted the Age Discrimination in Employment Act ("ADEA") to "promote the employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment."[1] Since its enactment, the ADEA has been amended numerous times.[2] In 1990, Congress passed the Older Workers Benefit Protection Act ("OWBPA"), which sets forth the minimum requirements necessary for a valid, knowing, and voluntary waiver of an ADEA claim.[3]

The petitioner, Dolores M. Oubre ("Oubre"), was employed by the respondent, Entergy Operations, Inc., ("EOI") as an assistant scheduler in the Planning and Scheduling Department at a power plant in Killona, Louisiana.[4] In 1994, EOI implemented a new employee ranking procedure called the "Management Planning and Review Ranking Process."[5] Oubre received the lowest possible ranking and was notified by her supervisor that she had the option

1. 29 U.S.C. § 621(b) (1998).

2. The ADEA was enacted in 1967 and amended in 1974, 1978, 1984, 1986, 1987, 1990, and 1996. *See* 29 U.S.C. §§ 621-34 (1998).

3. 29 U.S.C. § 626(f)(1)(A)-(H) (1998).

4. Oubre v. Entergy Operations, Inc., 118 S. Ct. 838, 840 (1998); *see also* Petitioner's Brief at 5, *Oubre* (No. 96-1291). Specifically, Oubre worked at the Waterford Steam Electric Generating Station and had been employed there for seven years. Petitioner's Brief at 5.

5. Respondent's Brief at 2, *Oubre* (No. 96-1291). Under the ranking process, all salaried employees at the plant were ranked in comparison to their peers in the categories of performance and potential. *Id.* Each employee was then placed in a group ranging from 1 to 9 (1 being the highest and 9 the lowest). *Id.*

of improving her performance or resigning voluntarily and receiving severance compensation.[6] After reviewing the information from EOI for fourteen days and consulting with two attorneys, Oubre decided to accept the severance pay and sign the release.[7] The release Oubre signed waived all of her present and future rights against EOI.[8] However, the release did not comply with the specific statutory requirements set forth in OWBPA.[9]

After receiving all of her severance pay from EOI, Oubre filed a charge of age discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC").[10] The EEOC declined to pursue Oubre's charge but issued her a "right-to-sue" letter.[11] Oubre then commenced suit against EOI in the United States District Court for the Eastern District of Louisiana, alleging constructive discharge on the basis of age.[12] The district court granted summary judgment in favor of EOI, holding that, although the waiver did not comply with the requirements of OWBPA, Oubre's failure to tender back the severance pay constituted a ratification of the waiver.[13] The

---

6. *Oubre*, 118 S. Ct. at 840. As an employee with a 9 ranking, if Oubre was ranked a 9 again in the next evaluation, she would be terminated without the benefit of any severance pay. Petitioner's Brief at 7 and Respondent's Brief at 3, Oubre (No. 96-1291). Oubre had the option of either remaining with the company and working to improve her 9 ranking or signing a release and receiving severance pay.

7. *Oubre*, 118 S. Ct. at 840. Oubre received severance pay totaling $6,258. *Id.*

8. *Id.*

9. Oubre v. Entergy Operations, Inc., No.CIV.A. 95-3168, 1996 WL 902063, at *1 (E.D. La. 1996). In relevant part, the release stated that "I, Dolores M. Oubre, knowingly, voluntarily, and for valuable consideration agree to waive, settle, release, and discharge any and all claims, demands, damages, actions, or causes of action . . . that I may have against Entergy. . . ." *Id.* The United States Supreme Court held that "the release did not comply with at least three of the specific requirements listed in OWBPA." *Oubre*, 118 S. Ct. at 840. Specifically, the Court noted that EOI did not give Oubre enough time to consider her options, nor did it give her seven days after she signed the release to change her mind. *Id.* Furthermore, according to the Court, the release made no specific reference to claims under the ADEA. *Id.*; *see* 29 U.S.C. § 626(f)(1)(B),(F),(G) (1998).

10. *Oubre*, 118 S. Ct. at 840.

11. *Id.* A would-be plaintiff must first file a charge with the EEOC and wait 60 days before filing a civil action in court. 29 U.S.C. § 626(d)(2) (1998).

12. *Id.*

13. *Oubre*, 1996 WL 902063, at *1. OWBPA provides requirements that must be met in order to validly waive an ADEA claim. *Id.* According to the *Oubre* Court, there is no dispute that the requirements were not met in this case. *Id.* at *2. Nevertheless, the court followed the Fifth Circuit's holding in *Wamsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993), in which a waiver that failed to meet the requirements of OWBPA was held to be voidable at the employee's option, not void. *Id.* In *Wamsley*, the court held that "the employee manifests an intention to be bound by the waiver and makes a [new, enforceable] promise to abide by its terms if the employee does not tender back the benefits paid in consideration for the agreement." *Wamsley*, 11 F.3d at 540. The *Oubre* Court held that "since the facts fit *Wamsley*, we are not at liberty

United States Court of Appeals for the Fifth Circuit affirmed.[14] The Supreme Court of the United States granted certiorari, reversed, and remanded the case for further proceedings.[15]

The United States Supreme Court granted certiorari to decide whether the common law doctrines of tender back and ratification apply to ADEA claims.[16] EOI claimed that by retaining the severance pay, Oubre ratified the defective waiver and, therefore, her ADEA action was barred.[17] However, the United States Supreme Court rejected this argument and held that the waiver could not bar the ADEA claim because it did not conform to OWBPA requirements.[18] Noting that the common law and contract principals of tender back and ratification invoked by EOI did not apply, the Court held that a waiver cannot be a valid release of an employee's ADEA claim unless it complies with OWBPA.[19] In Oubre's case, it was undisputed that the waiver did not comply with OWBPA.[20] Therefore, the Court concluded that Oubre's waiver of the ADEA claim could not be enforced against her and, therefore, her ADEA suit was not barred.[21]

In a concurring opinion, Justice Breyer agreed that, because the waiver did not comply with the strict requirements of OWBPA, Oubre was free to bring her ADEA suit without tendering back the

---

to disregard the law announced by the Fifth Circuit." *Oubre*, 1996 WL 902063, at *2.

14. Oubre v. Entergy Operations, Inc., 112 F.3d 787, 788 (1996). The court of appeals found no reversible error in either the record or the parties' briefs and, without further explanation, affirmed the district court's holding. *Id.*

15. *Oubre*, 118 S. Ct. at 841-42. The court held that, although Oubre had not returned or offered to return the money she received for signing the release, because the defective release did not comply with OWBPA, it could not bar Oubre's ADEA claims. *Id.* at 842.

16. *Id.* at 841. The tender back doctrine requires that a plaintiff return the consideration received in exchange for a release on the theory that it is inconsistent to bring suit against the defendant while at the same time retaining the consideration received in exchange for a promise not to bring such a suit. *Id.* at 845.

In contract law, ratification is the "act of adopting or confirming a previous act which without ratification would not be an enforceable contractual obligation . . .." BLACK'S LAW DICTIONARY 1262 (6th ed. 1990). Furthermore, "[t]he act of ratification causes the obligation to be binding as if such was valid and enforceable in the first instance." *Id.*

17. *Oubre*, 118 S. Ct. at 840-41. When she decided to sue, Oubre did not give back, nor did she offer to give back, the severance pay received in return for waiving all future rights against EOI. *Id.*

18. *Id.* at 842. Justice Kennedy delivered the opinion of the Court. *Id.* at 840.

19. *Id.* at 842; 29 U.S.C. § 626(f)(1) (1998).

20. *Oubre*, 118 S. Ct. at 842.

21. *Id.* Oubre's ADEA claims were not barred even though she did not tender back the severance pay received. *Id.*

severance pay from EOI.[22] However, Justice Breyer specified that the invalid waiver was not entirely void of legal effect but, instead, was voidable only at Oubre's option.[23] He also noted that, although noncompliance with the requirements of OWBPA prohibited ratification of the previous agreement, that agreement, itself, was voidable, not void.[24] Justice Breyer further stated that, because the agreement was voidable and Oubre's suit was not barred, once Oubre abandoned her original promise and filed suit, EOI was entitled to ask for restitution of the severance pay.[25]

Justice Thomas dissented from the majority opinion and found that OWBPA does not address the doctrines of tender back or ratification; therefore, OWBPA does not supersede these common law doctrines.[26] He determined that, because OWBPA merely defines "knowing and voluntary" and does not address tender back or ratification, both common law doctrines should apply to ADEA claims as well as other claims.[27] As a result, Justice Thomas rejected the majority's reasoning and argued that Oubre's claim should be barred.[28]

In a separate dissenting opinion, Justice Scalia concurred with Justice Thomas' argument that OWBPA does not supersede the common law doctrines of tender back and ratification.[29] Justice

---

22. *Id.* at 843 (Breyer, J., concurring). Justice Breyer noted that "a promise ratifying a voidable contract may itself be voidable for the same reason as the original promise, or it may be voidable or unenforceable for some other reason." *Id.* (citing RESTATEMENT OF CONTRACTS 2D § 85, Comment b, (1979)). The concurring opinion was joined by Justice O'Connor. *Id.*

23. *Id.* at 843-44. Justice Breyer found that the contract created was voidable and Oubre could have either avoided or ratified it. *Id.* In support of his argument, Justice Breyer reasoned that "it seems unlikely that Congress, enacting a statute meant to protect workers, would have wanted to create . . . a void waiver as a result of an employer's failure to follow the law, . . . whether or not . . . [the employee] intended to bring suit." *Id.* at 844.

24. *Id.* at 844.

25. *Oubre*, 118 S. Ct. at 844(Breyer, J., concurring).

26. *Id.* at 845 (Thomas, J., dissenting). Justice Thomas relied on the long-established principle that "a statute must speak directly to the question addressed by the common law in order to abrogate it." *Id.* He also noted that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Id.* Justice Thomas further stated that "the OWBPA does not address the tender back or ratification doctrines at all, and thus, the doctrines apply and Oubre's suit is barred." *Id.* Chief Justice Rehnquist joined in this dissenting opinion. *Id.*

27. *Id.* at 846.

28. *Id.*

29. *Id.* at 845 (Scalia, J., dissenting). Justice Scalia agreed without further explanation. *Id.*

Scalia further agreed that, because Oubre did not tender back the severance pay, the judgment of the court of appeals barring Oubre's ADEA claim should be affirmed.[30] However, Justice Scalia did not agree that ratification provided a separate basis for affirming the Court of Appeals' decision.[31] He reasoned that "since the OWBPA both requires that a waiver of an ADEA claim must be 'knowing and voluntary' and [also] provides requirements for such a waiver, a waiver which does not comply with the statute cannot be ratified."[32] Because Oubre's waiver did not comply with OWBPA's requirements, Justice Scalia's position was that the Court of Appeals' decision should be affirmed based on the lack of tender back but not on the ratification doctrine.[33]

On December 15, 1967, President Johnson signed into law the now-controversial ADEA.[34] The primary purpose of the ADEA as enacted in 1967 was "to eliminate age discrimination against older applicants in hiring."[35] The ADEA was first amended in 1974 as part of the Fair Labor Standards Amendments of 1974; however, the 1978 amendments provided the first major changes to the ADEA statute.[36] The 1978 amendments revised Sections 623, 630, 631, 633a, and 634 of Title 29 and Sections 8335 and 8339 of Title 5.[37] The amendments included changes to the involuntary retirement and jury trial provisions of the ADEA and transferred the authority to enforce the ADEA from the Secretary of Labor to the EEOC.[38]

---

30. *Oubre*, 118 S. Ct at 845 (Scalia, J., dissenting).

31. *Id.* Justice Scalia noted that the plain language of the statute, on its face, did not allow ratification of a waiver if the waiver did not comply with the specific requirements. *Id.*

32. *Id.*

33. *Id.*

34. *See* 29 U.S.C. § 621 (1998). The ADEA combines Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act. *Id.*

35. DANIEL P. O'MEARA, PROTECTING THE GROWING NUMBER OF OLDER WORKERS: THE AGE DISCRIMINATION IN EMPLOYMENT ACT 1-19, 49-52 (University of Pennsylvania, The Warton School, 1989) (citing H.R. Rep. No. 805, 90th Cong., 1st Sess. 4. (1967). As originally enacted, the ADEA prohibited discrimination in the private sector on the basis of age of individuals between forty and sixty-five years of age. *Id.* at 14. *See* 29 U.S.C. § 621 et seq. 634 (1998).

36. *Id.* at 15 (citing Pub. L. No. 93-259, § 28-29, 88 Stat. 55, 74-76 (1974)). O'Meara notes that, in 1974, Congress expanded the ADEA to include more businesses by changing the minimum number of employees necessary for the ADEA to apply from twenty-five to twenty. *Id.* Federal, state, and local government employees were also covered under the ADEA for the first time. *Id.* Moreover, four years later, the 1978 Amendments codified the result in *Lorillard v. Pons*, 434 U.S. 575 (1978) (guaranteeing all parties the right to a jury trial) and overruled *United Air Lines v. McMann*, 434 U.S. 192 (1977). *Id.*

37. 29 U.S.C. § 621 (1998).

38. 29 U.S.C. §§ 621-34. *See* Pub. L. No. 95-256, 92 Stat. 189-193 (1978). Congress

The 1984, 1986, and 1987 amendments expanded the ADEA's protection in the areas of health care, mandatory retirement, and employee pension benefit plans.[39]

Pursuant to the 1990 amendments, Congress enacted OWBPA.[40] OWBPA sets forth the requirements that render valid the waiver of an ADEA claim.[41] The statute provides that "[a]n individual may not waive any [ADEA] right or claim unless the waiver is knowing and voluntary" and sets forth minimum requirements that must be met for a waiver to be considered knowing and voluntary.[42]

---

granted the EEOC investigative, record keeping, and enforcement responsibility. *Id.*

39. *See* 29 U.S.C. §§ 621-34. *See also* Deficit Reduction Act of 1984, Pub. L. No. 98-369 (1985) (extending the ADEA's health insurance requirements to workers between the ages of sixty-five and sixty-nine); Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272, 100 Stat. 82 (1986) (extending protections available under the ADEA to workers in the private sector and most state and local government workers seventy years of age and older and exempting from mandatory retirement for seven years state and local public safety officers); Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874 (1988) (requiring employers to continue paying pension benefits according to plan requirements without regard to age as a factor in such benefits).

40. *See* 29 U.S.C. § 626. The 1990 Amendments amended Title 29, sections 623, 630, and 631. *See* OWBPA, Pub. L. No. 101-433, 104 Stat. 978 (1990), noting as follows:

> The Older Workers Benefit Protection Act, amends the . . . ADEA in two important respects. The bill makes clear that discrimination on the basis of age in virtually all forms of employee benefits is unlawful. In addition, the bill ensures that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA.

Id. at 5.

41. 29 U.S.C. § 626(f)(1) (1998).

42. 29 U.S.C. § 626(f)(1)(A)-(H), (f)(2) (1998). The minimum requirements that must be present for a valid waiver of an ADEA claim are as follows:

> (A) the waiver is a part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate; (B) the waiver specifically refers to rights or claims arising under this Act; (C) the individual does not waive rights or claims that may arise after the date the waiver is executed; (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled; (E) the individual is advised in writing to consult with an attorney prior to executing the agreement; (F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement; (G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired; (H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F) informs the individual in writing a manner calculated to be understood by the average eligible to participate, as

Oubre is the first case in which the United States Supreme Court renders an opinion based on OWBPA. Nevertheless, a similar issue was presented in the 1968 decision of *Hogue v. Southern Railway Co.*, in which the Supreme Court considered whether the tender back of consideration was a prerequisite to a railroad employee's bringing of an action under the Federal Employers' Liability Act ("FELA").[43] After Hogue suffered a knee injury at work, he executed a release of all claims against the railroad in return for consideration.[44] The Court rejected the railroad company's argument that tender back of the consideration is required unless the execution of a release is obtained by fraud.[45] The Court held that to require the consideration to be tendered back before allowing a suit to be filed would be contrary to the policy of the Act.[46] However, the Court also held that, in the absence of tender back, the amount of the consideration should be deducted from any award ultimately due to the employee.[47]

Oberg v. Allied Van Lines, the first case of significance after the 1990 enactment of OWBPA, applied and extended the *Hogue* Court's view on tender back.[48] In *Oberg*, the United States Court of Appeals for the Seventh Circuit held that a severance agreement that does not comply with OWBPA is not a knowing and voluntary waiver and, therefore, cannot be considered to be ratified by an

---

to - (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

Id. Furthermore, the individual must be given a reasonable period of time within which to consider the settlement agreement. *Id.*

43. Hogue v. Southern Ry. Co., 390 U.S. 516 (1968).

44. *Id.* at 517. Hogue received $105, which he did not return or offer to return before filing suit. *Id.*

45. *Id.* The Supreme Court reiterated that "[w]e have held that an express agreement of an injured employee who obtained funds from a carrier to help defray living expenses first to return the sum paid as a prerequisite to the filing and maintenance of an action under the FELA was void under § 5 of the Act." *Id.*

46. *Id.* at 518.

47. *Id.*

48. Oberg v. Allied Van Lines, Inc., 11 F.3d 679 (7th Cir. 1993). As part of a reduction in force, Allied fired 60 employees, including the plaintiffs in this case. *Id.* As part of their severance agreements, the plaintiffs promised to release Allied from all claims arising from their employment. *Id.* at 681. The severance agreements also provided that in the event of a plaintiff's breach, that plaintiff was required to return all severance benefits to Allied. *Id.*

employee who retains the consideration.[49] Judge Flaum, writing for the court, specified that the tender back of consideration is not a prerequisite to commencement of an ADEA claim.[50] Therefore, the court concluded that the severance agreement drafted by Allied Van Lines did not comply with OWBPA requirements and held that the company could not enforce its severance agreement against the plaintiffs as a valid waiver of their ADEA claims.[51]

In *Wamsley v. Champlin Refining and Chemicals*, the United States Court of Appeals for the Fifth Circuit examined the issues addressed in *Oberg* and reached a contrary conclusion.[52] Champlin employees Wamsley, Whittenberg, Nagy, and Sanders were among those informed that they were going to be "let go" as the result of an office being closed.[53] Each employee was provided with a "Notice Pertaining to Release of Claims" document and a "Release of Claims" agreement.[54] The releases waived any action or claim an employee might have against Champlin and in return for signing the waiver, each employee received severance benefits that he or she otherwise would not have been entitled to receive.[55] Although the notice specifically allowed the employees to take up to forty-five days to consider executing the waiver, the employees brought suit, alleging that Champlin failed to provide them with the forty-five days in which to consider the agreement as required by OWBPA.[56] Because the employees did not return or offer to return the severance benefits they received before filing suit, Champlin argued that even if the waivers were invalid, the employees ratified the waivers by retaining the benefits.[57] Judge DeMoss, writing for

---

49. *Id.* at 683. It is undisputed that the plaintiffs did not return or offer to return the severance pay before filing suit. *Id.* at 681. Allied admitted that, at the time the waivers were signed, OWBPA was in effect; however, the waivers did not comply with the provisions. *Id.* Nevertheless, Allied argued that, even if the waivers were invalid under OWBPA, the plaintiffs ratified them by accepting and retaining the severance pay. *Id.*

50. *Id.* at 684.

51. *Id.* at 685.

52. Wamsley v. Champlin Refining and Chemicals, Inc., 11 F.3d 534 (5th Cir. 1993). The *Wamsley* opinion was handed down on December 30, 1993—one month and one week after the Seventh Circuit decided *Oberg*. *Id.* The *Wamsley* Court found that "the Seventh Circuit improperly analogized the FELA to the ADEA and, thus, arrived at the erroneous conclusion that *Hogue* precludes a tender back requirement in suits brought under the ADEA." *Id.* at 541.

53. *Id.* at 536.

54. *Id.*

55. *Id.* at 536-37.

56. *Id.*; *see also* OWBPA, 29 U.S.C. § 626(f)(1)(F)(ii) (1998).

57. *Wamsley*, 11 F.3d at 537.

the majority, concluded that justice and equity require an employee to tender back the consideration received in exchange for executing a waiver when the employee later seeks to avoid the agreement.[58] The *Wamsley* Court distinguished between void and voidable contracts and relied on the contract principle of ratification.[59] The court noted that it did not interpret OWBPA language to mean that a noncomplying waiver is void of legal effect but, rather, that waivers that are not knowing or voluntary are subject to avoidance only at the option of the employee.[60] The court held that "[since the employees] chose to retain and not tender back . . . the benefits paid [to] them in consideration for their promise not to sue Champlin, they manifested their intention to be bound by the waivers and thus, made a new promise to abide by their terms."[61] As a result, the Court held that regardless of whether the waiver complies with OWBPA requirements, "[t]he Court will enforce their new conduct based promises as it legally and equitably should," and, therefore, the employees' suit was barred.[62]

In *Soliman v. Digital Equipment Corporation*, the United States District Court for the District of Massachusetts followed the Seventh Circuit's reasoning in *Oberg*.[63] The court held that a waiver of ADEA claims that did not comply with OWBPA was entirely void of legal effect and, as such, could not be ratified by an employee's act of merely accepting and retaining the benefits given in exchange for the waiver.[64] The *Soliman* Court found that the tender back of benefits received was not a prerequisite to filing an

---

58. *Id.* at 542. The *Wamsley* Court relied on previous Fifth Circuit decision, *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (1991). Judge DeMoss noted that "[i]n *Grillet*, the Court held that when an employee agrees to release her employer from liability under the ADEA and receives benefits as consideration for the agreement, the employee ratifies the agreement if she retains the consideration after learning that the release is voidable." *Id.* at 538 (citing *Grillet*, 927 F.2d at 220).

59. *Id.* at 538. *See also supra* notes 13 and 16.

60. *Id.* at 539.

61. *Id.* at 540.

62. *Oubre*, 118 S. Ct. at 540.

63. Soliman v. Digital Equipment Corp., 869 F. Supp. 65 (D. Mass. 1994); *Oberg*, 11 F.3d at 679. As part of Digital's plan to achieve voluntary reduction of their workforce, Soliman, age fifty-nine, was given a Transitional Financial Support Option ("TFSO"). *Id.* at 66. The TFSO included "24.52 weeks of pay, a year of health insurance, and job placement counseling in exchange for Soliman's voluntary resignation and waiver of all claims against Digital, including any claims of age discrimination." *Id.* Soliman signed the TFSO on December 13, 1990. *Id.*

64. *Soliman*, 869 F. Supp. at 68. OWBPA was enacted in October, 1990, and, in November, 1990, Digital gave the TFSO to its employees. *Id.* at 66. Digital admitted that the waiver signed by Soliman did not comply with OWBPA. *Id.* at 67.

ADEA claim.[65] However, the court also held that the employer was entitled to a deduction for the benefits received if the employee later received damages.[66]

The United States District Court for the Western District of Michigan's 1995 decision in *EEOC v. Sara Lee Corp.* was also consistent with the Seventh Circuit's decision in *Oberg*.[67] The district court held that the waivers executed by four employees releasing Sara Lee from liability were not knowing and voluntary and could not be ratified by the employees' acceptance and retention of their severance benefits.[68] The court further specified that the tender back of benefits is not a prerequisite to an ADEA suit.[69] Following *Soliman*, the Sixth Circuit also held that if a plaintiff prevails, the jury must determine what portion of benefits should be deducted from any damages awarded.[70]

In contrast, in 1996, the United States Court of Appeals for the Fourth Circuit followed *Wamsley*; the court held in *Blistein v. St. John's College*[71] that a waiver that failed to comply with OWBPA was merely voidable and could be ratified by accepting and retaining benefits.[72] Judge Luttig, writing for the majority, held that

---

65. *Id.* at 69. Clarifying itself, the court explained that "OWBPA, in other words, establishes a floor, not a ceiling. An effective waiver at a minimum must incorporate OWBPA's requirements. A waiver that is more expansive that OWBPA would be valid, but it must at least incorporate OWBPA's essentials." *Id.* at 69 n. 13.

66. *Id.* at 70.

67. Equal Employment Opportunity Commission v. Sara Lee Corp., 923 F. Supp. 994 (W.D. Mich. 1995). The court did not find *Wamsley* persuasive but, instead, followed *Oberg* and held that "[u]nder OWBPA, unless a waiver contract takes the form required by the statute, an employer and an employee cannot contract to waive the ADEA provisions... ." *Id.* at 998; *See also* OWBPA, 29 U.S.C. § 626(f)(1) (1998).

68. *Sara Lee Corp.*, 923 F. Supp. at 998. The court held that the Sara Lee "discharged the [four] employees as part of a [group] employment termination program and that the waivers contained in the severance agreements did not meet the statutory requirements for knowing and voluntary waivers." *Id.* at 1000. The court concluded "as a matter of law, that the waivers were not knowing and voluntary under the ADEA." *Id.* at 997.

69. *Id.* at 1000. The court held that "the employees did not ratify the waivers by accepting and retaining the benefits and that the employees [were] not required to tender back the benefits." *Id.*

70. *Id.*

71. 74 F.3d 1459 (4th Cir. 1996). *Blistein*, 74 F.3d 1459, 1465 (4th Cir. 1996).

72. *Blistein*, 74 F.3d 1459, 1465 (4th Cir. 1996). The court found that "*Wamsley*, not *Oberg*, is the post-OWBPA decision that is most in accord with our circuit precedent." *Id.* at 1466. Blistein had been an "artist in residence" for twenty years at St. John's College. *Id.* at 1463. As a result of severe budget cuts, the college eliminated Blistein's position. *Id.* Although it was under no obligation to do so, the college immediately notified Blistein of its decision, "so that he had the opportunity to retire before he became ineligible for health benefits under the College's new benefits policy." *Id.* Blistein decided to retire and received a generous benefit package. *Id.* Had the college waited

"[n]othing in OWBPA . . . abrogates the common law principle that an invalid agreement can be ratified by subsequent conduct."[73] Therefore, the court held that "ratification of an invalid release of an ADEA claim is possible."[74]

In 1997, the Third Circuit encountered the ratification and tender back issues in *Long v. Sears Roebuck & Company*.[75] However, the Third Circuit's analysis differed slightly from the decisions of the other circuits.[76] The Third Circuit noted that, in both *Oberg* and *Wamsley*, the courts first focused on whether the defective release was voidable or void and then considered the issue of returning the severance benefits.[77] However, in *Long*, the Third Circuit reasoned that "the important question was whether the retention of benefits prevents an ADEA claim."[78] The court concluded that neither the doctrine of ratification nor that of tender back was meant to apply in ADEA cases; therefore, the court did not address the void–voidable distinction.[79] Writing for the majority, Judge Mansmann found that "we are convinced that the ratification doctrine should not apply to a waiver of age discrimination claims which is invalid under the OWBPA and . . . [an employee] should not be required to tender back severance benefits before proceeding with his age discrimination claims."[80]

---

to notify him, Blistein would not have been eligible for post-retirement health benefits. *Id.* Nevertheless, Blistein later sued St. John's College for age discrimination. *Id.*

73. *Id.* at 1466. The court characterized the case as baseless and "precisely the type of litigation that every day threatens to undermine, rather than advance, the laudable objectives of the antidiscrimination laws by causing the Courts and the public alike to view even the most meritious claims with suspicion." *Id.* at 1473.

74. *Id.*

75. Long v. Sears Roebuck & Co., 105 F.3d 1529 (3d Cir. 1996). Long had been employed by Sears for more than thirty years. *Id.* at 531. For more than 12 years, Long hadworked in the Home Improvement Products & Services Division ("HIPS"), where he received excellent performance evaluations. *Id.* Upon being informed that Sears was discontinuing the HIPS unit, Long signed a release, drafted by Sears, in which he waived all claims associated with his employment and termination (including age discrimination). *Id.* The release did not comply with OWBPA provisions and was held to be invalid. *Id.*

76. *Id.* at 1529. The district court followed the *Wamsley* decision and held that the retention of the benefits ratified the waiver and barred the ADEA claim. *Long v. Sears Roebuck & Co.*, No. CIV.A. 95-0141, 1996 WL 94537 at *8 (E.D. Pa. 1996). However, the Third Circuit decided the appeal as a matter of law and reversed the district court's decision. *Long*, 105 F.3d at 1529.

77. *Long*, 105 F.3d at 1537.

78. *Id.*

79. *Id.*

80. *Id.* at 1531. Long did not return or offer to return the more than $39,000 severance pay that he had received. *Id.*

In *Howlett v. Holiday Inns, Inc.*,[81] the Sixth Circuit explored the ratification and tender back issues and followed the *Oberg* Court's reasoning.[82] The court held that an employee cannot ratify a release agreement that does not comply with OWBPA by retaining the consideration received and that the tender back of the consideration is not a prerequisite to filing a claim.[83] The court also found that "[t]he OWBPA unambiguously states at Section 626(f)(1) that an individual 'may not waive' ADEA claims unless the OWBPA requirements are met. There is no hint of any exception."[84] The court held that, under the terms of OWBPA, the release signed by the plaintiffs was not knowing and voluntary and, consequently, was not valid.[85] The Sixth Circuit also noted that the ratification doctrine could not validate the waiver.[86] The court concluded that, under the ratification doctrine, a new promise would be made by the employee retaining the benefits; nonetheless, the court held that the new promise would be invalid because it too would not comply with the terms of OWBPA.[87]

In *Oubre*, the United States Supreme Court validated the decisions of the majority of circuit courts and held that a waiver that does not comply with OWBPA "knowing and voluntary" requirements cannot bar an ADEA claim.[88] Although a majority of the circuits have held that a valid waiver must meet the requirements of OWBPA, a minority, including the Fifth Circuit, in *Wamsley*, and the Fourth Circuit, in *Blistein*, have held otherwise.[89] The minority

---

81. 120 F.3d 598 (6th Cir. 1997).

82. *Howlett*, 120 F.3d 598 (6th Cir. 1997). After a corporate restructuring, the plaintiffs lost their jobs. *Id.* Each plaintiff signed a separate agreement releasing Holiday Inns, Inc., from all claims relating to his or her employment in return for severance pay. The releases were invalid under OWBPA. *Id. See also*, *Oberg*, 11 F.3d 679.

83. *Howlett*, 120 F.3d at 599. The plaintiffs did not return or offer to return the severance pay. *Id.* at 601.

84. *Id.* at 601.

85. *Id.* at 600.

86. *Id.* at 602.

87. *Id.*

88. *See Hogue*, 390 U.S. at 516; *Oberg*, 11 F.3d at 679; *Soliman*, 869 F.Supp. at 65; *Sara Lee Corp.*, 923 F.Supp. at 994; *Long*, 105 F.3d at 1529; and *Howlett*, 120 F.3d at 598, discussed *supra*.

89. *Howlett*, 120 F.3d at 601. *See Wamsley*, 11 F.3d at 541; *Blistein*, 74 F.3d at 1472. *Blistein* can be distinguished from *Oubre* in that, in *Blistein*, the defendant, St. John's College, was under no obligation to provide Blistein the option to receive severance benefits. *Blistein*, 74 F.3d at 1472. St. John's, under severe budgetary constraints and purely of its own goodwill, agreed to provide Blistein with substantial benefits for himself and his family, to which he would not otherwise have been entitled. *Id.* After receiving the benefits, Blistein filed a suit for age discrimination. *Id.* Because Blistein's

courts have held that the waiver is voidable and can be ratified by the employee's failure to tender back the benefits.[90] Addressing this particular issue, the Sixth Circuit in *Howlett* identified the problem with the minority view, noting that "*Blistein* and *Wamsley* fail to address the straightforward language of OWBPA Statute. Congress has set out its own requirements for assessing ADEA waivers and if the requirements are not met, the waiver is not effective."[91] The view of the Supreme Court and the majority of the circuits is the better view because it is necessary to look at the plain text and follow the statutes as Congress has written them.[92] Therefore, if a waiver of ADEA claims does not comply with OWBPA requirements, it is invalid and an employer cannot enforce that waiver against the employee, regardless of contract principles.[93]

The stated purpose of Justice Breyer's concurring opinion in *Oubre* was to specify that a waiver that is completed in violation of OWBPA is not totally void of legal effect but is, instead, voidable at the option of the employee.[94] Many of the Justices agreed with the concept that Oubre's release was voidable but, nevertheless, reached different results.[95] Justice Breyer reasoned that a voidable waiver would protect employees from employers who unilaterally renege on their promise to provide severance pay or benefits.[96] He also concluded that a voidable waiver would permit employers to recover restitution of payments previously paid to employees in return for the waiver when employees subsequently sued, thereby, preventing a windfall to such an employee.[97]

Although the Supreme Court held that Oubre was not required to tender back the severance pay she received, it did not reach the

---

suit was baseless, as is clearly reflected in the court's decision, the holding cannot be applied to a valid claim for age discrimination. *Id.*

90. *Howlett*, 120 F.3d at 601.

91. *Id.* The court wrote, "[t]he OWBPA unambiguously states at § 626(f)(1) that an individual 'may not waive' ADEA claims unless the OWBPA requirements are met. . . . Thus, . . . the employee could not assent to the waiver of his claims after having signed the defective release than she could at the time of signing it." *Id.* at 601.

92. *Id.*

93. 29 U.S.C. § 621-34 (1998). It is significant to note that OWBPA speaks only to valid waivers of ADEA claims and not to other claims that the employee might also have waived in the release. *Id.*

94. *Oubre*, 118 S. Ct. at 843.

95. *Id.* at 844. Justice Breyer noted, "[a]pparently, five or more Justices take this view of the matter [that the invalid release was voidable not void]. As I understand the majority's opinion, it is also consistent with this view. . . ." *Id.* at 845.

96. *Id.* at 844.

97. *Id.*

issue of whether EOI was entitled to restitution, recoupment, or setoff from Oubre.[98] Although the Supreme Court stopped short of deciding this issue, a number of circuit courts have correctly held that, in an *Oubre* scenario, the court should determine whether the consideration received should be setoff against any later award to the employee.[99] This is also the result set forth in Justice Breyer's concurring opinion.[100] Although OWBPA requirements must be met to effectively waive an ADEA claim, an employee should not receive a windfall if his or her waiver was ineffective. Such an employee should be permitted to keep the compensation received before trial, but that amount should offset any later award. The Supreme Court's silence on this issue in *Oubre* does not preclude courts from making such determinations in future proceedings.[101]

In their dissenting opinions, Justices Thomas and Scalia agreed that releases that are invalid under OWBPA are merely voidable.[102] However, each Justice retained a firm hold on the common law doctrines of tender back and ratification.[103] Both Justices argued that neither tender back nor ratification was "abrogated" by OWBPA.[104] Justice Thomas argued that, unless OWBPA explicitly repealed these common law doctrines, they apply to ADEA cases.[105] According to Justice Thomas, "ratification does not conflict with the purpose of the OWBPA . . . because it occurs only when the employee realizes that the release does not comply with the OWBPA and nevertheless assents to be bound."[106] However, this result conflicts with OWBPA, which sets forth the requirements that must be met to validly waive an ADEA claim.[107] Under

98. *Id.* at 842.

99. *See Hogue*, 390 U.S. at 517; *Oberg*, 11 F.3d at 685; *Soliman*, 869 F. Supp. at 69; *Sara Lee Corp.*, 923 F. Supp. at 994; and a recent post-*Oubre* decision, *Rangel v. El Paso Natural Gas Co.*, NO. 96CV01249, 1998 WL 84603 (D.N.M. 1998) (addressing the waiver of a Title VII claim.) In *Rangel*, the district court stayed proceedings until the Supreme Court had decided *Oubre* and then held followed *Oubre*. *Rangel*, 1998 WL 84603 at *1. Judge Parker, writing for the majority, held that an employee is not required to tender back the severance pay received for a waiver of Title VII action against an employer. *Id.* The court also held that any award should be offset by the amount of severance received. *Id.*

100. *Oubre*, 118 S. Ct. at 844.

101. *Id.* at 841.

102. *Id.* at 845.

103. *Id.*

104. *Id.*

105. *Oubre*, 118 S. Ct. at 846.

106. *Id.* at 847.

107. *See* 29 U.S.C. § 626(f) (1998).

the statute, if a waiver does not comply with OWBPA provisions, it is invalid—period.[108] In his dissent, Justice Scalia correctly stated the principle: the mere fact that an employee initially and unknowingly assents to a noncomplying waiver does not make that waiver valid.[109]

Both Justice Thomas and Justice Scalia reason that an employee must tender back the consideration received as a precondition to filing a suit.[110] Both Justices were concerned with the situation in which an employee would receive a windfall if he or she were permitted to retain the consideration or benefits and also bring suit against the employer.[111] This concern is valid, but it can be addressed without invoking the common law doctrine of tender back. The majority of circuit courts and Justice Breyer's concurring opinion in *Oubre* have held that the tender back of consideration is not a prerequisite to suing; however once an employee does sue and recovers in court, the employer is entitled to restitution of the consideration already paid to the employee.[112] Justice Thomas and Justice Scalia go too far: the employee should be permitted to sue, but any prior compensation should offset a later award resulting from the suit.

The Supreme Court's holding that the contract doctrines of tender back and ratification are superseded by Congress' enactment of OWBPA is a good start in the fight against age discrimination in employment. However, America's older workers need greater protection. One major problem for aging workers is OWBPA's lack of sanctions for employer noncompliance.[113] For example, in *Howlett*, the Court noted that "there is no automatic penalty if the employer

---

108. *Id.*

109. *Oubre*, 118 S. Ct. at 845. In his dissent, Justice Scalia agreed that although OWBPA did not abrogate the doctrine of ratification, it was not applicable in the case of a waiver that did not comply with OWBPA provisions. *Id.* According to Justice Scalia, "[t]hat a party later learns that those [knowing and voluntary] requirements were not complied with no more enables ratification of the waiver than does such knowledge at the time of contracting render the waiver effective *ab initio* [from inception]." *Id.*

110. *Id.* at 845.

111. *Id.*

112. *Id.* at 844. Justice Breyer argued that "[o]nce [the employee] has sued, however, nothing in the statute prevents his employer from asking for restitution of his reciprocal payment or relief from any ongoing reciprocal obligation." *Id.* Justice Breyer noted that "[a] person who transfers something to another believing that the other thereby comes under a duty to perform the terms of a contract . . . is ordinarily entitled to restitution for what he has given if the obligation intended does not arise and if the other does not perform." *Id.* (quoting RESTATEMENT OF RESTITUTION § 47, Comment b (1936)).

113. *Howlett*, 120 F.3d at 602.

fails to write a valid release."[114] Therefore, one step in providing increased protection would be for Congress to amend OWBPA to include strict sanctions for waivers that violate the age discrimination statutes.[115] Under current age discrimination laws, employers can ignore the statutes in hopes that they will not be taken to court.[116] Because age discrimination is a reality and a problem that could potentially affect every worker at some point, the results of current enforcement under the statutes should hardly be considered satisfactory.

Maureen R. Jordan

---

114. *Id.*

115. *Id.* The *Howlett* Court noted that OWBPA requirements should not be hard for an employer to meet and, therefore, there is no reason not to comply with the purpose of OWBPA "to provide employees with sufficient information to evaluate the worth of potential ADEA claims." *Id.* If sufficient information is given and an employee waives his or her potential claims, then that employee would be precluded from bringing suit in the future. *Id.* at 603.

116. *Id.* The court identified the following potential problem with the ADEA:

> [I]n cases where the employer knows that it has impermissibly discriminated based upon age . . . the employer may gamble and decide not to provide the OWBPA information, hoping that the employee who does not know he has been discriminated against will be less likely to sue, and will also accept less money for the ADEA waiver.

Id.